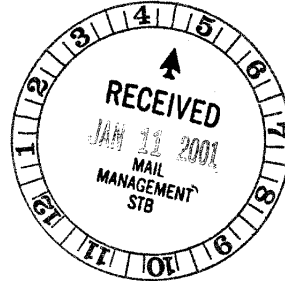


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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 582 (Sub-No. 1)  
MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF THE  
CITY OF MANKATO, MN

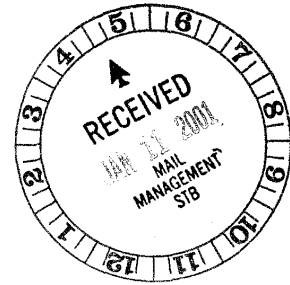
John D. Heffner  
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(202) 785-3700

Dated: January 11, 2001

ORIGINAL

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)  
MAJOR RAIL CONSOLIDATION PROCEDURES



COMMENTS OF THE  
CITY OF MANKATO, MN

I. INTRODUCTION

By decision served October 3, 2000, the Board initiated this Notice of Proposed Rulemaking (NPRM) proceeding, setting November 17, 2000, December 18, 2000, and January 11, 2001, respectively, as the due dates for filing comments. Consistent with that schedule, the City of Mankato, MN ("Mankato") filed its initial comments on November 17. Mankato did not file any comments on December 18 because it was anxious to get a response to its views before making any additional filings. Having reviewed the reply comments submitted by other parties, Mankato is now prepared to offer its rebuttal.

II. REBUTTAL COMMENTS

Mankato is a city and political subdivision established under Minnesota law located about 90 miles south of the Twin Cities and 125 miles west of the Mississippi River in southern Minnesota. As noted in its initial filing, two freight railroads serve Mankato [the Union Pacific Railroad ("UP"), a large class I railroad, and the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"), a class II railroad]. Both railroads

operate through the downtown area, with DM&E exercising trackage rights over UP's line.<sup>1</sup> Mankato is appearing in this proceeding because many of the traffic flow/community impact and environmental issues associated with the DM&E construction proceeding<sup>2</sup> are also common to railroad consolidation proceedings.

On rebuttal, Mankato feels compelled to address the following issues:

- (1) The need for a more thorough administrative review of proceedings involving a major environmental or community impact;
- (2) The length of the administrative process;
- (3) Board review of and public access to voluntary agreements and settlement agreements; and
- (4) The essential service provided by short line and regional railroads.

1. More thorough administrative proceedings

In its initial comments, Mankato suggested that the Board conduct evidentiary hearings at locations served by merger applicants in order to be able build a better record from parties who may not be able to afford to come to Washington to make their views known or where written comments would be inadequate. Other parties such as the Ohio Rail Development Commission suggested review of proposals by independent consultants or the creation of

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<sup>1</sup> UP's line extends in a northeasterly-southwesterly direction from the Twin Cities to Omaha. DM&E's line extends from east to west from an interchange with CP Rail near Winona, MN, to South Dakota.

<sup>2</sup> Docketed as FD No. 33407, Dakota, Minnesota & Eastern Railroad Corporation, Construction in the Powder River Basin.

an independent office of public counsel to represent the "public interest" in major proceedings. Initial comments of the City of Mankato at 4; ORDC NPR Opening at 13-6. Class I railroad objections aside, it is inconceivable that the Board would not want to give a major railroad merger proceeding the fullest consideration possible -- especially a proceeding leading to the final structure of the American railroad industry. Field hearings would give the Board a better sense of the transaction's community impact than merely reviewing reams of paper submitted by participants located hundreds or thousands of miles away. Use of public counsel and/or publicly-funded independent consultants would ensure the proper representation of interests who may lack the financial resources to employ expertise skilled in the intricacies of a very esoteric field of administrative law and economics. America gives the criminally accused a right to court appointed counsel. Why not public counsel in an economic matter of national consequence?

2. Length of proceedings

Several class I railroad parties complain that the regulatory approval time under the proposed rules is too lengthy. Conversely, the United States Department of Transportation and the Union Pacific Railroad properly noted that an expedited processing schedule should not come at the expense of a proper record. See, Reply Comments of the United States Department of Transportation at 7 ("the Board should be especially careful that any expedited time frame does not give short shrift to a full

exploration of the major issues") and Union Pacific's Reply Comments at 35. Mankato could not agree more. In fact, Mankato endorses USDOT's suggestion that where an expedited handling schedule is required, special procedures be established to give communities an early opportunity to consider the transaction's environmental and other community impacts. Reply Comments of the United States Department of Transportation at 8.

3. Review of and public access to agreements

Another issue of concern to the City involves various types of agreements made between merger applicants and other parties. These could include unregulated traffic routing agreements such as haulage agreements, carrier alliances, marketing agreements, and traffic-related settlement agreements. Also settlement or other agreements involving community impact and environmental issues could be of concern to Mankato.

Mankato recognizes that under traditional railroad commerce law some of these agreements are not normally subject to Board scrutiny. But where these agreements could drastically affect traffic flows<sup>3</sup> with obvious environmental and community impacts of the sort presented in the DM&E construction case and several recent rail mergers, the Board should act.<sup>4</sup> To the

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<sup>3</sup> One case which comes to mind involves the recent haulage agreement between Wisconsin Central, Ltd., and the Canadian National Railway which substantially increased traffic levels over that regional carrier.

<sup>4</sup> Board action is especially important in view of recent court rulings pre-empting state or local safety and environmental regulation. See case law cited in FD No. 33466, Borough of Riverdale - Petition for Declaratory Order - The New York

extent the Board believes it lacks the power to regulate these agreements, it should seek appropriate legislation.

In a similar vein, Mankato urged that the Board be able to examine agreements imposed or approved in prior transactions which could present serious environmental or community impacts involving traffic flows. Initial Comments of the City of Mankato at 8 and 9. While some have criticized Mankato's review proposal or suggested that it may be outside the Board's power, Mankato believes that the Board could revisit the appropriateness of a provision in an agreement when one party to that agreement is an applicant for a new merger transaction.

In short, Mankato agrees with those parties who believe these agreements should be filed with the Board for its approval and should be available for public review subject to appropriate protection for confidential information.

#### 4. Essential rail service issues

Numerous parties have debated whether or not the applicants to a class I railroad merger with numerous operational disruptions should be required to compensate shippers or smaller railroads for the adverse consequences of those problems. While Mankato takes no position as to shipper impact, it is very concerned about the financial health of connecting short line and regional railroads such as the DM&E. As the Kansas City Southern Railway stated quite correctly, "[s]hortlines and regional

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Susquehanna And Western Railway Corporation (served Sept. 10, 1999). Otherwise affected parties may have nowhere to turn for relief.

railroads, like many shippers, are occasionally caught in the fallout of failed merger planning, and are often left without meaningful recourse when their service deteriorates due to faulty class I railroad connections." Reply Comments of the Kansas City Southern Railway at 7. Many short lines are so fragile financially that a service problem with their class I connection which affects their cash flow could well be their death knell. And to that extent, shippers could lose essential rail service. Accordingly, the Board needs to formulate a mechanism - either through this NPRM or in a specific merger proceeding - which allows short line railroads affected by traffic loss due to merger-related service breakdowns to recoup lost revenues.<sup>5</sup>

### III.

### CONCLUSION

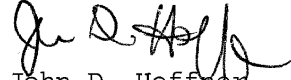
Mankato urges the Board to carefully consider the views of the public agency participants in this proceeding as well as the comments filed by short line and regional rail interests and rail users. It appreciates the opportunity to participate in

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<sup>5</sup> Although some class I railroads have opposed any sort of generalized claims recovery mechanisms for short line railroads and shippers, two class I railroads - Burlington Northern And Santa Fe and Union Pacific - have indicated that some form of payment of damages might be appropriate in some cases. See, Reply Comments of the Burlington Northern And Santa Fe Railway Company at 33 ("BNSF is not arguing that no level of damages is ever appropriate in some cases") and Union Pacific's Reply Comments at 11 ("UP continues to recommend that the Board provide a base level of financial protection for shippers who do not negotiate service agreements").

this proceeding.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "John D. Heffner". The signature is stylized with a large, looped "J" and a cursive "H".

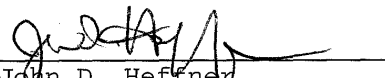
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(202) 785-3700

Dated: January 11, 2001



**CERTIFICATE OF SERVICE**

I hereby certify that I have served the forgoing on all known parties of record on the service list on this the 11th day of January, 2001, by U.S. Mail postage prepaid.

  
John D. Heffner